IN THE

Supreme Court of the United States

October Term 1946

No. 364

SILESIAN AMERICAN CORRPORATION, Debtor
and SILESIAN HOLDING COMPANY,

Petitioners,

against

TOM C. CLARK, Attorney General, as successor to The Alien Property Custodian,

Respondent.

BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

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Opinion of the Court Below

The opinion in the Circuit Court of Appeals for the Second Circuit has been reported at 156 F. (2d) 793 and also appears in the certified copy of the Transcript of Record (R. 63 *seq.*). The opinion of the District Court also appears in the transcript (R. 49):

Jurisdictional Statement

The basis upon which it is contended that this Court has jurisdiction to review the order of affirmance are the provisions of Sec. 121 of the Chandler Act (52 Stat.

885; 11 U. S. C. §521); the provisions of §47 of the Bankruptcy Act (52 Stat. 855; 11 U. S. C. §47), and §240(a) of the Judicial Code (28 U. S. C. §347).

Statement of the Case

The Silesian American Corporation is a Debtor in a proceeding for reorganization of a corporation under the Chandler Act (52 Stat. 883), and the Silesian Holding Company is the owner of more than half of all the outstanding preferred and common shares of the Silesian American Corporation.

The Debtor is a Delaware Corporation whose corporate structure is set forth in the petition filed with the District Court (R. 5). For many years 50,000 shares of Debtor's 7% cumulative non-voting preferred stock (41.67%) with a par value of $5,000,000, and 98,000 shares of its common stock (49%) without par value but with a stated value of $490,000, were registered in the name of a Swiss corporation briefly referred to as "Non-Ferrum" (R. 6). This latter corporation was included in the list of blocked nationals revised February 7, 1942 (R. 6).

Debtor's income being derived from sources in Europe, was interrupted by the war and Debtor was consequently unable to meet obligations on a bond issue which matured August 1, 1941 (R. 40 and 41). Petition herein was therefore filed and trustees appointed July 30, 1941 (R. 34 to 39). In his report under §167 (5) of the Chandler Act (52 Stat. 890), the trustee found that the Debtor's shares registered in the name of Non-Ferrum had been pledged as security for loans of several millions of dollars made by certain Swiss banks and banking houses (R. 41) under the leadership of La Roche & Co. of Basle,

Switzerland (R. 47). In June, 1941, these Swiss banks were willing to lend to the Debtor substantial funds to meet its maturing obligations but the Treasury Department would not license this transaction (R. 41), despite the facts that in the several proceedings before the Treasury the interests of the Swiss banks were clearly established and the banks were not included in the so-called "black-list" nor was there any suggestion that they were inimical to the United States (R. 7).

Hence, this is not a case where the Alien Property Custodian issued a vesting order covering the described shares without knowing that they were held by friendly aliens as pledgees.

In November 1942, the Alien Property Custodian disregarding the non-enemy interest of the Swiss banks and their status as pledgees and disregarding also the fact that the shares were frozen under Executive Order 8389, issued a vesting order upon a finding that the shares registered in the name of Non-Ferrum were property of "a national of a designated enemy country (Germany)" and "determining that to the extent that any or all such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of the aforesaid enemy country * * *" (R. 14). The order did not mention or express any intention to vest the interests of the Swiss banks.

In February 1943 the Custodian demanded that the Debtor cancel on its books the certificates issued to Non-Ferrum and issue new certificates in the name of the Custodian (R. 16). The outstanding certificates were held by the Swiss banks and their attorney thereupon notified the Debtor that if such new certificates were issued, the Debtor

would act at its peril (R. 27). The order appointing trustees contains no provision authorizing the issuance by the Debtor of any certificates (R. 34 to 39).

§8(a) of the Trading With the Enemy Act of 1917 provides that a pledgee of enemy property with power of sale who is not an enemy or ally of enemy may retain possession of the property, and the history of this section in Congress showed that it was not intended that the Alien Property Custodian could summarily take possession of enemy property in the hands of a friendly pledgee. The amendment to §5(b) contained in the First War Powers Act, 1941, authorized the vesting of property of a foreign government or national thereof, but did not repeal or nullify this provision of §8(a). Furthermore, if §5(b) be regarded as an wholly independent method for seizing foreign property, it was unconstitutional. In addition there were numerous other questions as to the meaning of the applicable statute and the effectiveness of the procedure resorted to by the Alien Property Custodian thereunder.

The Debtor therefore obtained an order directing that cause be shown why the District Court should not instruct the Debtor under the circumstances (R. 3). A motion, originally returnable May 12, 1943 (R. 3), was adjourned from time to time until June 26, 1945, when it was argued at length, and thereafter an order was made under date of October 30, 1945, directing the Debtor to cancel on its books and records all evidence showing that the described shares are owned by Non-Ferrum, and requiring the Debtor to issue and deliver to the Alien Property Custodian new certificates representing the said shares (R. 50).

An appeal to the Circuit Court of Appeals for the Second Circuit was promptly taken by the Debtor (R. 52) and

also by its majority stockholder the Silesian Holding Company (R. 60). The notice of appeal was served upon all parties entitled to notice in the reorganization proceedings. Only the Alien Property Custodian filed a brief and appeared in opposition at the hearing. The appeal was argued on June 5th and the Circuit Court of Appeals affirmed the order of the District Court on July 3rd, 1946, with an opinion by Judge Learned Hand (R. 63 *seq.*).

Judge Hand arrived at this conclusion by (1) holding that §5(b) represented an exercise by Congress of its power to provide for the common defense and general welfare, despite the fact that this Court had said in *Stoehr* v. *Wallace* (1921) 255 U. S. 239-241, that the Trading With the Enemy Act was strictly a war measure and represented an exercise by Congress of its power to declare war and make rules concerning captures on land and sea; (2) developing a theory for delegation of legislative power quite beyond anything heretofore enunciated by this Court; (3) holding that friendly aliens do not have the same rights as American citizens to recover vested property thus violating existing treaties; (4) holding that a friendly alien whose property has been appropriated may recover just compensation in the Court of Claims under the Tucker Act, despite the provisions of 7(c) of the Trading With the Enemy Act that the sole relief and remedy of any person having any claim to money or property seized by the Custodian should be the remedy provided by §9(a), and also despite the provision of §259 Tit. 28 U. S. C., denying to the Court of Claims jurisdiction of claims dependent on a treaty, and also §261 of the same Title denying jurisdiction to an alien whose government does not provide a reciprocal right to American citizens; (5) holding that the express provi-

sions of §8(a) must be disregarded because they cannot be rationalized with the rest of the opinion; and (6) disregarding the assumption expressed by this Court that "where Congress amends only one section of a law leaving another untouched, the two were designed to function as parts of an integrated whole".

In his opinion Judge Hand indicated a serious misapprehension of petitioner's argument when he said (R. 67), "It so chances that both the Debtor and the Custodian take the position that a friendly alien may not sue under §9(a)". The petitioners did not take this position, but argued that *if* the construction placed upon §5(b) by the Custodian is correct, then a friendly alien cannot recover vested property, and as so construed the statute is unconstitutional.[1]

The Question Before the Court

The primary question before the Court is whether in view of the provisions of §8(a) of the Trading With the Enemy Act of 1917 exempting pledged property from seizure, the Alien Property Custodian can take possession of shares of stock held by friendly aliens as pledgees with power of sale.

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[1] At page 10 of petitioners' brief in the Circuit Court of Appeals it was said, "If §5(b) as amended is held constitutional, such a result can only be arrived at on some theory whereby the 'permanent' sections of the 1917 statute operate to sustain such constitutionality, as occurred in *Draeger Shipping Co.* v. *Crowley* (1943) 49 F. Supp. 15 * * *", and on page 27, "Thus, according to the Alien Property Custodian, the Attorney General, and the District Court of the United States, so far as the rights of friendly aliens are concerned, no measure of due process is provided by §9(a) of the 1917 statute because a friendly alien is not entitled to bring a proceeding under §9(a) if its property was vested under 5(b)."

As a corollary is the question whether the District Court, having the Debtor in its custody in a reorganization proceeding under the Chandler Act, should cause the officers of the Debtor to issue new and unrestricted certificates to the Alien Property Custodian for shares having a value of several million dollars when the said shares and the original certificates representing them are claimed to be held by such Swiss banks, who are friendly aliens, as pledgees with power of sale, and the trustee of the Court under Sec. 167(5) of the Chandler Act (52 Stat. 890; 11 U. S. C. §567(5)) has reported facts substantiating such claims.

Specification of Errors

1. The Circuit Court erred in failing to hold that under the provisions of §8(a) a friendly alien holding enemy property as pledgee with a power of sale may retain possession of such property as against the demand of the Alien Property Custodian.

2. The Circuit Court erred in holding that after the amendment of §5(b) by the First War Powers Act 1941, §8(a) could no longer protect the possession of friendly alien pledgees.

3. The Circuit Court erred in holding that a friendly alien stands in a position different from a citizen whose property has been seized.

4. The Circuit Court erred in holding that a friendly alien whose property has been seized by the Alien Property Custodian is justly compensated by an implied promise to pay just compensation.

5. The Circuit Court erred in failing to hold that the provisions of §250 Tit. 28 U. S. C. whereby suit may be brought against the United States in the United States Court of Claims for property taken, are not available to the Swiss banks because their rights rest primarily on a treaty of friendship between Switzerland and the United States and §259 Tit. 28 U. S. C. deprives the United States Court of Claims of jurisdiction when the claim is dependent on a treaty.

6. The Circuit Court erred in failing to hold that §7(c) of the Trading With the Enemy Act precludes any relief or remedy to a person whose property has been seized except that provided by the said Act.

7. The Circuit Court erred in failing to hold that the power exercised by Congress in authorizing the President to vest the property of any foreign country or national thereof was the same power that had been exercised in enacting the Trading With the Enemy Act of 1917.

8. The Circuit Court erred in holding that the power exercised by Congress in amending §5(b) of the Trading With the Enemy Act with respect to the vesting of foreign property was the power to provide for the common defense and promote the general welfare.

9. The Circuit Court erred in failing to hold that the exculpatory clauses of §5(b) and §7(e) are unconstitutional as representing attempts to establish by statute conclusive presumptions.

10. The Circuit Court erred in failing to hold that §5(b) and §7(e) are unconstitutional as representing attempts to invade the judicial process.

11. The Circuit Court erred in holding that under §9(a) a friendly alien would have the formal capacity to sue because he is not an enemy or ally of enemy, whereas the Court holds that under §8(a) he would not have the formal capacity to retain possession of pledged property.

12. The Circuit Court erred in assuming that the vesting order of the Alien Property Custodian was a valid and effective order so far as the interests of the Swiss banks are concerned.

13. The Circuit Court erred in failing to hold that §5(b)(2) and §7(e) do not protect the Debtor and relieve it from doubt as to possible liability.

14. The Circuit Court erred in affirming the order of the District Court.

Summary of Argument

I. Under §8(a) of the Trading With the Enemy Act the Alien Property Custodian cannot take possession of property held by a friendly alien as pledgee with power of sale.

II. There is no sound reason for concluding that in amending §5(b) Congress intended to change the provisions of §8(a).

III. If the amendment of §5(b) by the First War Powers Act, 1941, has not repealed or modified §9(a), it necessarily follows that §8(a) has not been repealed or modified.

IV. The exculpatory provisions of §5(b)(2) and §7(e) do not protect the debtor and relieve it from doubt as to possible liability.

V. The District Court erred in failing to give the Swiss banks an opportunity to prove their rights as pledgees with power of sale.

VI. The order of the District Court should be reversed and the District Court should be directed that new certificates for the shares described in Vesting Order 370 may not be issued to the Alien Property Custodian or in the alternative the case should be remanded to the District Court to take further proof to determine whether the Swiss banks are friendly aliens and the said shares are held by the Swiss banks as pledgees within the exemption provisions of §8(a).

POINT I

Under §8(a) of the Trading With the Enemy Act the Alien Property Custodian cannot take possession of property held by a friendly alien as pledgee with power of sale.

By reason of the provisions of §8(a) the petitioners claim that the Custodian is not legally authorized summarily to take possession of shares held by friendly aliens as pledgees with power of sale. The trustee appointed by the Court reported to the Court the existence of such liens before the United States entered the war. The claim of the Swiss banks that they hold these certificates and the shares represented thereby as collateral security for a very substantial loan has never been disputed (p. 41).

In enacting the Trading With the Enemy Act of 1917 Congress specifically anticipated a situation wherein enemy property would be held by a non-enemy as collateral security for a loan, and Congress expressly reserved to the non-

enemy the right to retain possession of such property, and granted to the Alien Property Custodian only the right to receive the equity therein.

§8(a) reads as follows (40 Stat. 418; 50 U. S. C. A., p. 237):

> "* * * Any person not an enemy or ally of enemy holding a lawful mortgage, pledge or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, * * * may continue to hold said property, and, after default may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally; *provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required; *provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may pre-

scribe, and such surplus shall be held subject to his further order."

From this statute it clearly appears that under the 1917 Act a pledgee with power of sale who is not an enemy or ally of enemy was entitled to continue to hold the pledged securities and the interest of the Custodian was confined to the equity of the enemy, that is to say, to the surplus proceeds from any sale. §8, above quoted, can only mean that where friendly aliens hold possession of certificates as pledgees representing shares originally issued to aliens believed to be enemy, the Alien Property Custodian cannot disregard the rights and interests of the pledgees and require the issuing corporation to cancel on its books the evidence of ownership of the shares held by such pledgees and to issue to the Custodian new certificates representing the shares held by the friendly aliens as pledgees.

§8(a) was deliberately inserted in the statute by Congress for the purpose of limiting the power of seizure granted to the Custodian under §7(c).

The history of §8(a) clearly demonstrates that Congress intended to withhold from the Custodian the power summarily to take into his possession securities held by non-enemy pledgees. This appears conclusively from a perusal of the *Hearings before the Sub-committee of the Committee on Commerce, U. S. Senate, 65th Congress, 1st Session, on H. R. 4960*, which was the original draft of the Trading With the Enemy Act. The bill as introduced contemplated that the Secretary of Commerce should act in the position ultimately assigned to the Alien Property Custodian, and §8 provided that a non-enemy pledgee might dispose of its securities under such rules and regulations and after such notice as the Secretary of Commerce, with the approval of

the President might prescribe (*id.*, p. 15, lines 16, *et seq.*). The N. Y. Stock Transfer Association caused its representative to appear before the Sub-Committee and urge several amendments, the fifth of which proposed the insertion in §8 of the words "continue to hold the same and" so as expressly to provide that a non-enemy pledgee "• • • may continue to hold the same and after default dispose of such property • • •". The purpose of this proposed amendment was explained as follows (*id.*, p. 59):

> "This amendment is proposed in order to make clear what we believe to be the real meaning of section 8 and to remove a doubt which might otherwise arise whether the provisions of section 8 were not to a certain extent in conflict with the provisions of section 7(c). As the act now stands, it might be interpreted as safeguarding the mortgagee, pledgee, or lienor only if and to the extent that the Secretary of Commerce should refrain from exercising in respect to the mortgaged or pledged property the powers conferred by section 7(c), whereby he may require that property or money owing to or belonging to enemies shall be transferred and delivered to the alien property custodian. We do not believe that this is the intent of Congress, • • • to deprive a citizen of the United States of the possessory rights which he shall have at the time of the passage of this act as an incident to his mortgage, pledge, or lien. But as the act now stands, we know that in many quarters it has created a sense of uneasiness and insecurity. This will be removed by the adoption of the proposed amendment."

Assistant Attorney General Warren, who prepared the original bill, informed the Committee that he believed the amendment desirable (*id.*, p. 160; see also p. 185).

The obvious intention of Congress was, that where shares registered in the name of stockholders believed to be enemies were actually held by non-enemy pledgees as security, the Custodian could not summarily take possession of such securities.

This Court approved such a construction of the statute in 1920. In *Garvan* v. *$20,000 Bond* (CCA 2nd 1920) 265 F. 477 aff'd 254 U. S. 554, certain German insurance companies, in compliance with state laws, deposited securities with trustees who were to hold the securities primarily for the purpose of paying the claim of any policy holder admitted to be due by the company or established by the claimant in due course of law, and secondarily for the benefit of the companies. The Alien Property Custodian libeled these securities, as being enemy property, and the trustees urged that they were entitled to retain the securities under the provisions of §8. In disposing of the trustees' argument that they were lien holders entitled to the protection of §8, the Circuit Court of Appeals said at page 480:

> "We do not think that the trustees claimants are mere lien holders under section 8 of the act, and as such to be *entitled to retain possession of the property in question;* they are, as stated above, trustees with an active duty, and not lien holders, within the meaning of the section at all. *It clearly protects the lienholders, and especially the vast amount of loans against collateral, any interference with which would cause great injury to banks, trust companies and stockbrokers, and produce disturbance of business generally.*" (Italics supplied)

In a connected case which came before the Circuit Court of Appeals for the Second Circuit at the same time *sub nomine Garvan* v. *$50,000 Bond* the opinion of Judge A. N.

Hand in the District Court, which was unreported, but which may be found in the record on appeal at folio 432 *et seq.* said at folio 450:

> "* * * the section as finally enacted preserved the remedies of lienors, but only in a limited class of cases where the 'mortgage, pledge or lien or other right in the nature of security in property of an enemy or ally of enemy' was one 'which by law or by the terms of the instrument creating such mortgage, pledge or lien, or right, may be disposed of on notice or presentation or demand' (Section 8a). * * * Disturbance of bank loans, secured by collateral, by any novel mode of liquidation and interference with foreclosure of ordinary mortgages might have seriously interfered with normal financial operations by American citizens. Consequently the Act was redrafted so as to allow such liens to be enforced in the customary way. * * * If the Custodian was not entitled to possession of pledged property not within this provision, what was the purpose or need of the provision?"

The decision of the District Court in *Garvan* v. *$50,000 Bond* was affirmed by the Circuit Court of Appeals in the decision reported *sub nomine Garvan* v. *$20,000 Bond* (*supra*).

The fact that Congress had withheld from the Custodian the power summarily to seize enemy property pledged with a person who is not an enemy or ally of enemy was implicitly conceded in the briefs submitted on behalf of the Alien Property Custodian when both of the above mentioned cases were argued before the Circuit Court of Appeals.

No case has been found arising out of World War I in which the Alien Property Custodian attempted to seize

pledged securities concededly held within the provisions of section 8(a). As appears from the group of cases represented by *Garvan* v. *$20,000 Bond* (*supra*) if the Custodian believed that he was entitled to possession of securities held by non-enemies who claimed to be pledgees, the practice was for the Custodian to libel the property and thus to obtain an adjudication of his rights.

Judge Learned Hand in his opinion below conceded that if §5(b) as amended by the First War Powers Act, 1941, did not modify §8(a), a friendly alien as pledgee with power of sale would be entitled to retain enemy property held by him as collateral security. In his opinion Judge Hand said (p. 67):

> "It is true that in the original Act, §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; and, for the argument, we will assume that it forbade disturbing the possession of any pledgee who was not himself an enemy or ally of an enemy. * * *".

Therefore, the Swiss banks, holding the shares under an agreement of pledge whereby the shares could be disposed of on notice or presentation or demand, were entitled to retain possession of the same, and the Alien Property Custodian did not have any power to demand that he be given possession of these shares through delivery to him of unrestricted certificates representing the same.

The question therefore arises as to what effect if any the amendment of §5(b) by the First War Powers Act, 1941 had on the provisions of §8(a).

POINT II

There is no sound reason for concluding that in amending §5(b) Congress intended to change the provisions of §8(a).

The Trading With the Enemy Act of 1917 as originally enacted contained several sections designed to provide for the seizure of enemy property. §6 established the office of the Alien Property Custodian to receive such property; §7 outlined the methods of seizure and the incidents thereof; §8 exempted from seizure property pledged or mortgaged to a non-enemy; it also dealt with contracts in which one of the parties was an enemy, and suspended the Statute of Limitations; §9 provided for the recovery of property mistakenly seized; §10 dealt with enemy patents and trademarks and §12 prescribed the manner in which the Alien Property Custodian should deal with enemy property seized, and authorized the return of property as provided in §9. §11 related to the importation of property, and represented a prohibition rather than a power to seize. All of these sections except 11 were definitely intended to reflect the power of Congress to seize enemy property in time of war.

On the other hand, §5(b) of the original statute was not related to the seizure of property but authorized the President to regulate foreign exchange, monetary metals and transfers of securities between the United States and "any foreign country whether enemy, ally of enemy or otherwise." One would gather from the statement made in *Stoehr* v. *Wallace* (1921), 255 U. S. 239-241, that this also represented an exercise of the war power.

In any event, when President Roosevelt in 1933 sought authority to arrest the outflux of gold from the United States which was then in progress, recourse was had to the provisions of §5(b) and the action taken was ratified when Congress shortly thereafter amended §5(b) so as to remove any doubt as to its applicability (48 Stat. 1).

Upon the invasion of Norway the President desired to regulate foreign property so as to protect it from the Germans, and §5(b) was again resorted to through the issuance of Executive Order 8389 (3 C. F. R. Cum. Supp., p. 645). Shortly thereafter §5(b) was further amended in a minor way but the amendment contained a provision ratifying and approving the Executive Order and the regulations that had previously been issued (54 Stat. 179). Executive Order 8389 was amended from time to time with each new German aggression (3 C. F. R. Cum. Supp., pp. 657, 674, 687, 689, 796, 904, 910, 917, 929), and it was generally revised and broadly expanded by Executive Order 8785 issued June 14th, 1941 (3 C. F. R. Cum. Supp., p. 948), which contained numerous provisions not found in the earlier orders.

When, following Pearl Harbor, §5(b) was again amended by the First War Powers Act, 1941, the power to regulate foreign property was generally extended. In addition, there was inserted in the text, "and any property or interest of a foreign country or national thereof shall vest, when, as and upon the terms directed by the President * * *." In this manner Congress imported into §5(b) the exercise of a power to seize foreign property, whereas previously the subdivision had only authorized its regulation. It should be noted that in this amendment Congress did not ratify and approve all that had been previously

done by the Executive but only such orders and regulations as would have been authorized if the amendments had been in effect.

By introducing this power to vest as a part of §5(b) it was necessarily co-related to the rest of the Trading With the Enemy Act, and yet there nevertheless arose a question as to whether Congress in providing for the vesting of foreign property was exercising its war powers as expressed in §§6, 7, 8, 9, 10 and 12 of the Act or whether the vesting power represented the exercise of an entirely different constitutional power and set up a statute separate and apart from the old Act and to be administered as an autonomous statute. The office of the Alien Property Custodian was disposed to construe the statute as autonomous in its nature (see McNulty, *Constitutionality of Alien Property Controls*, XI Law and Contemp. Probs., 135; *Annual Report, Alien Property Custodian, June 30, 1943*, p. 150, where only §5(b) is set forth as the statute under which the Custodian was operating). A contrary view was expressed by an eminent authority on the subject who proposed that the vesting power granted by 5(b) was, because of its incorporation in that section, merely regulatory in its nature. (John Foster Dulles, *The Vesting Power of the Alien Property Custodian*, 28 Corn. L. R. 245.)

The question first came before this Court obliquely in *Markham* v. *Cabell* (1945) 326 U. S. 404 and the decision in that case eliminated the argument that the vesting power of §5(b) was to be construed as an autonomous and independent statute. This was a necessary result of the holding that the Trading With the Enemy Act of 1917 automatically went into effect again at the outbreak of war and that §9(a) was still to be given effect, in connection with which deci-

sion the Court further stated that there was no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §9(a), and that the normal assumption is that where Congress amended only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.

With these considerations as a background, it is desirable to examine the evidence as to whether Congress by introducing into §5(b) a power to vest foreign property, intended to exercise its war power with respect to enemy property, or contrary to long-standing American policy, in violation of existing treaties, in conflict with existing statutes, and in a manner unconstitutional according to previously declared standards, intended to deal with all foreign property, enemy, ally of enemy or otherwise.

A question as to what effect §5(b) has had on the permanent sections of the Act also arose in *Uebersee Finanz-Korporation* v. *Markham* (1946) 158 F. 2d 313. There again the question related to §9(a) which provided that a person not an enemy or ally of enemy could recover possession of property vested by the Custodian. The Custodian argued in effect that §5(b) had obliterated the words "enemy or ally of enemy" from §9(a) and had substituted in their place "foreign country or national thereof". In the case at bar §8(a) provides that a person not an enemy or ally of enemy may retain possession of pledged property and the question again is whether §5(b) has obliterated the words "enemy or ally of enemy" and substituted in their place "foreign country or national thereof". Essentially the same question is presented in both cases.

In the *Uebersee* case Mr. Chief Justice Groner concluded that Congress did not intend to obliterate from §9(a) the words "enemy or ally of enemy" because to resolve the

problem in this manner would require a major job of statutory reconstruction and raise grave doubts as to the constitutionality of §5(b). An examination of the entire statute readily discloses what Mr. Chief Justice Groner had in mind concerning the job of statutory reconstruction. In the Trading With the Enemy Act of 1917 as it existed at the close of World War I the phrase "enemy or ally of enemy" was used 66 different times as a noun phrase and 14 different times as an adjective phrase modifying a noun, as for example, in §8(c) where reference is made to "enemy or ally of enemy country" (50 U. S. C. A., p. 238). If the effect of §5(b) was to obliterate these words from §8(a) and §9(a) it would logically follow that a similar change should be made wherever the words "enemy or ally of enemy" elsewhere appeared in the statute. Aside from the fact that these changes would be contrary to the meaning of the words "enemy or ally of enemy" as defined in §2, the construction would lead to somewhat unexpected results. Thus under §3(a) it would be unlawful for a unlicensed person to trade with any other person with knowledge or reasonable cause to believe that such other person is a *foreign country or national thereof*. §3(d) if so changed would make it unlawful for any person to send a letter directly or indirectly to a *foreign country or a national thereof*. Consequently, during World War II it would have been unlawful to trade or communicate with Canada under the severe penalty contained in §16.

By the provisions of §7(b) if changed so as to substitute "foreign country or national thereof" for "enemy or ally of enemy", no person would by virtue of any assignment, etc. of any debt etc. by, from or on behalf of any *foreign country or national thereof* have any right or remedy against the debtor.

Under §8(b) if so changed any contract entered into prior to the beginning of the war with any citizen of the United States and a *foreign country or national thereof* could be abrogated by any citizen who was a party thereto.

Under §8(c) if so changed the running of any statute of limitations would be suspended with reference to the rights or remedies on any contract entered into prior to the beginning of the war between parties not *foreign governments or nationals thereof* and containing any promise to pay which is evidenced by drafts drawn against funds "in any enemy or ally of enemy country" until after the end of the war.

In addition to these difficulties, there are the constitutional considerations referred to by Mr. Chief Justice Groner and hereafter discussed. Not the least of these is the fact that an entirely different theory for the exercise of Congressional power must be found to justify the expropriation of alien property which does not belong to an enemy or ally of enemy. In *Stoehr* v. *Wallace* (1921) 255 U. S. 239, this court indicated that the power to seize enemy property contained in the Trading With the Enemy Act of 1917 was founded on the war power of Congress to confiscate enemy property. The war power of Congress cannot be used for expropriating the property of friendly aliens. Can it be assumed that Congress in amending a subdivision of a single section of the statute intended to transform the other provisions of the statute so as to reflect the exercise of an entirely different power?

Evidence as to Congressional Purpose

If we commence with the postulate adopted by this court in *Markham* v. *Cabell* (1945), 326 U. S. 404, that in amending §5(b) Congress did not intend to delete or nullify §9(a),

and that where Congress amended only one section of a law leaving another untouched, the two were designed to function as parts of an integrated whole, there is much in the history of §5(b) which suggests that Congress did not intend to exercise a different constitutional power or to substitute the phrase "foreign country or national thereof" in place of "enemy or ally of enemy" where these words appear in the old statute.

Immediately after Pearl Harbor the Attorney General submitted to Congress H. R. 6206 (77th Cong. 1st Sess. 1941) which simply re-enacted all the provisions of the Trading With the Enemy Act. The Judiciary Committee rewrote this bill and introduced the revision as H. R. 6233. The situation was described by Representative Michener (of the Rules Committee) as follows (87 *Cong. Rec., Pt.* 9, p. 9856):

> "The original bill was what we commonly call a 'shotgun' measure. No one can tell by reading that bill what it means, what it covers, what powers are given, and to whom. It attempts to *revive* legislation once enacted by the Congress but which has expired by limitation of time or which has been expressly repealed. The Committee on the Judiciary felt it necessary to rewrite the bill so that anyone reading it might have some idea as to what was intended by the bill." (Italics supplied)

The proceedings definitely show that the purpose of Congress was not to create a statute based on an entirely new and different theory of Congressional power, but substantially to revive the same statute as had been enacted in 1917.

When the bill came before the house the discussion disclosed much confusion as to the manner in which the

different members understood its provisions, but the dominant purpose clearly was substantially to restore the powers granted to the Executive during World War I, as appears from the following passages (87 *Cong. Rec., Pt.* 9):

> By Representative Fish (*idem*, p. 9856): "• • • This bill merely gives the President the same powers that were given to Woodrow Wilson in the last war • • •
>
> • • • • •
>
> "Title III deals with the Trading With the Enemy Act, the old Trading with the Enemy Act, with certain additional powers giving the President control over communications with foreign nations, *also giving the President the power to use property of the enemy that we may confiscate*. In the last war the President could confiscate every (sic) property but we were not able to use it to our own advantage. This bill gives him that additional power. • • •" (Italics supplied)

By Representative Sumners, Chairman of the Judiciary Committee (*idem*, p. 9858):

> "• • • This bill attempts to bring into one legislative enactment what is regarded to be those provisions of the Overman Act and Trading with the Enemy Act which it is required to legislate relative to now."

And further (*idem*, p. 9859):

> "Mr. Robison of Kentucky: Under the provisions of the Trading With the Enemy Act and the alien property custodian features under the old law, they could just take over property, securities, plants, and so forth, and hold them; but under the provisions

we are now considering the Government cannot only take them over and hold them but can use them as well.

"Mr. Kean: I do not believe this refers to foreign securities only, but might be construed to refer to securities held by anybody in the United States.

"Mr. Sumners of Texas: I do not believe so. *This is simply a section dealing with alien enemies.* (Italics supplied)

"Mr. Kean: If it deals with alien enemies I think it is perfectly all right.

"Mr. Sumners of Texas: *I believe there is no doubt about that.* (Italics supplied)

• • • • • •

"Mr. Jenkins of Ohio: The gentleman may have covered the point I am about to ask him for; I was not here when he started. Has the gentleman covered the main differences between this bill and the powers granted to President Wilson in the first World War?

"Mr. Sumners of Texas: I made the general statement that I believed for all practical purposes we may say there is no substantial difference. Some modifications have been made that were deemed necessary. Guided by experience certain modifications have been made, but I believe I can state generally and that the members of the Committee will generally agree, that there is no substantial difference between the provisions of this bill and the similar grants of power in the Overman Act and the Trading With the Enemy Act.

• • • • • •

"Mr. Jenkins of Ohio: I have the most profound respect for the gentleman and his committee but have wondered whether there was any controversy at all over this bill. The reason I am asking these ques-

tions is so that if I am asked about the bill I will know something about it, and want to say that the great Judiciary Committee of the House considered it and unanimously agreed on its report.

"Mr. Sumners of Texas: The Committee on the Judiciary did examine the bill. We recognize that it was a technical matter and pretty difficult for us to know all the details. *The committee was largely persuaded by the discovered facts, the recognized facts, that there is no substantial difference insofar as the committee could discover between the powers we propose to grant to this President and the powers which President Wilson had.* That is about as much as I can say." (Italics supplied)

Following these remarks, there was considerable discussion as to the extent to which the bill affected other than alien property, *i.e.*, domestic property.

Representative Gwynne (a member of the Judiciary Committee) after reviewing his understanding of Title III, referred to the power to vest the property of any foreign nation or national, and concluded (*idem*, p. 9862):

"* * * this is the principal difference between this law and the one we had during the last war—*the President may hold and use—that is the new part*—or sell such property for the benefit of the United States." (Italics supplied)

Representative Springer, in explaining why he proposed voting for the bill, said (*idem*, p. 9865):

"The other provision of the bill, and I refer to title III, with respect to 'trading with the enemy', has practically the identical provisions, as I understand it, that the bill contained which was in force during the last World War. * * *"

When expressed in terms of the greatest common denominator the House of Representatives certainly understood the bill to represent substantially nothing more than a revitalization of the powers granted to the President in World War I.

When the bill came before the Senate a similar thought of reviving the old legislation was the dominant idea. Proceedings before the Senate regarding Title III of the First War Powers Act, 1941, were carried in the Congressional Record under the heading "Re-enactment of • • • Trading With the Enemy Act", and when the bill was reported from the Committee, Senator Barkley referred to it as the bill "which re-enacts and revives the provisions • • • of the Trading With the Enemy Act" (87 *Cong. Rec., Pt.* 9, pp. 9789 and 9837).

Senator Van Nuys, Chairman of the Judiciary Committee of the Senate, being asked to make a statement concerning the provisions of the bill, responded (*idem*, p. 9838):

> "In a nutshell, the bill grants to the President of the United States the same *war* powers that were exercised by President Wilson during the last World War—and exercised by him with a great degree of success. (Italics supplied.)
>
> • • • • • •
>
> "• • • when it comes to the Trading with the Enemy Act, in the provisions for seizure and freezing of alien property, it goes further, and not only freezes it, but seizes the property; possession of it vests in the United States, and the property is to be liquidated and disposed of under the rules and regulations of the Department. To that extent it exceeds the powers granted President Wilson."

There then ensued considerable discussion as to Titles I and II. As to Title III, containing the amendment to §5(b), the following colloquy occurred (*idem*, p. 9845):

> "Mr. Vandenberg: • • • One final question and I am done.
>
> "Has the Senator now stated to the Senate all the powers in this proposed legislation which exceed the powers granted to President Wilson under the Overman Act and the Trading With the Enemy Act?
>
> "Mr. Van Nuys: I think so. I have not yet taken up Title III. That is the amendment to the Trading with the Enemy Act. As I remember, it is an exact copy of the former statute, except that in some instances it goes a little further. For instance, in the case of the Alien Property Custodian's Office, or such agency as may take the place of the former Alien Property Custodian's Office, the Attorney General informed us that there are at least $7,000,000,000 of funds that have to be seized or frozen under present conditions. This measure gives authority to that agency, whether it be the Alien Property Custodian or otherwise, not only to freeze these assets, but to seize them and dispose of them and liquidate them—something that has been contested in the powers of the Alien Property Custodian heretofore. So I will say to the Senator from Michigan that the bill is broader along that line. Outside of that, I know of no further extension of power than President Wilson had."

With no further discussion regarding Title III, the bill was passed by the Senate (*idem*, p. 9846). This record explains the opposition of the Senate to the Custodian's recent efforts to have written into the law a provision denying to friendly aliens the right to recover possession of property seized by the Custodian.

If the purpose of Congress was to revive the 1917 statute, it necessarily follows that Congress was intent on exercising its war power to deal with enemy property, and when reference was made to the vesting of property of "any foreign government or national thereof", this must have referred to the property of any enemy or ally of enemy government, unless otherwise indicated. When §5(b) was originally enacted in 1917 (40 Stat. 415), and amended in 1918 (40 Stat. 966), a reference was made to "any foreign country" and in order to show that this phrase was not to be construed as meaning "enemy or ally of enemy foreign country" there was inserted as a qualifying phrase, "whether enemy, ally of enemy or otherwise". Congress thereby demonstrated that in the context of this section the words "foreign country" might ordinarily be understood to mean "enemy or ally of enemy foreign country".

The same understanding appears also from §6 of the 1917 Act, where the word "alien" was used in describing the officer who was to administer the Act. He was called the "Alien Property Custodian" although his functions related only to the property of *enemy* aliens, and he did not have the power to seize the property of all aliens, but only the property of enemy or ally of enemy aliens.

The Judiciary Committee of the House in reporting the amendments to §5(b) made a similar use of the word "alien" in the sense of "enemy alien". The Committee referred to §301 of the bill as adding in substance to the existing freezing controls "the power contained in the Trading With the Enemy Act with respect to *alien* property". Since the only powers in that act which related to vesting alien property concerned enemy property, the

word "alien" was obviously used in the sense of "enemy alien" (H. Rep. 1507, 77th Cong. 1st Sess. p. 3).

Moreover, at the time of the enactment of the First War Powers Act, 1941, there was no particular need for such an extreme measure as would authorize the President to expropriate the property of friendly aliens, because there already existed the "freezing controls" of foreign property provided for by §5(b) as amended May 7th, 1940 (54 Stat. 179) and broad powers of requisition and condemnation to take over the property of both citizens and aliens.

The amendment to Executive Order No. 8389 issued June 14th, 1941 (Executive Order No. 8785, 3 C. F. R., Cum. Supp., p. 948) extended these freezing controls to transactions affecting the property of every country in continental Europe. (*Documents Pertaining to Foreign Funds Control,* Sept. 15, 1946, Press Release No. 1, p. 64.) It was not then, nor has it been at any time since, possible to transfer or otherwise deal with the shares of the Debtor that are the subject of the Vesting Order in the case at bar without first procuring a license from the Treasury Department. The attempt of the Custodian to vest the interests of the Swiss banks in these shares did not in any respect afford the United States a greater measure of security than already existed under the freezing controls.

As to alien property generally, in addition to freezing controls, the use by the government of all United States patents had been provided for in 1918 (35 U. S. C. §68, 40 Stat. 705; *Richmond Co.* v. *U. S.* (1928) 275 U. S. 331). The condemnation of land for military purposes was also provided for in 1918 (50 U. S. C. §171, 40 Stat. 518) and although this power was amplified by the Second War

Powers Act, 1942 (50 U. S. C. §171a, 56 Stat. 177), the amplification would not have been different if in the amendment of §5(b) by the First War Powers Act, 1941, the words "foreign country" were understood as "enemy or ally of enemy foreign country". The power to requisition military material and supplies intended for shipment abroad was conferred upon the President in October 1940 (54 Stat. 1090). The power to requisition military and naval supplies generally was enacted in April 1941 (50 U. S. C. §721; 55 Stat. 742). The power to take over foreign and domestic ships was granted in June 1941 (50 U. S. C. §§1271-75; 55 Stat. 242). And the power to take over plants for defense purposes was contained in the Selective Service Act of 1941 (50 U. S. C. §309; 54 Stat. 892). All these powers related to both citizens and aliens *and contained express references to compensation for the owners.*

For Congress in December 1941 to have intended to grant the President the power of expropriating property of friendly aliens merely because of the fact that they were aliens was wholly unnecessary so far as the safety of the United States was concerned, was contrary to historic American policy so far as international relations were concerned, and could only be rationalized on some theory of war hysteria which the record shows did not exist, at least in the minds of Congress.

The very fact that the amendment to §5(b) made no reference to compensation should in itself be sufficient to establish that Congress was thinking in terms of enemy property for which no compensation is required.

The purpose on the part of Congress to re-enact or revive the Trading With the Enemy Act of 1917 rather than

to supplant it by an act designed upon a different theory is corroborated by the persistent refusal of Congress to make further amendments proposed by the Alien Property Custodian and obviously intended to manifest a purpose to depart from the original pattern. In the 78th Congress, 2d Session, H. R. 4840 and H. R. 5031 were clearly introduced with the hope of confirming the construction of §5(b) now urged by the Custodian. These bills died in Committee. A renewed effort was made in the 79th Congress, 1st Session, to bring about this change by the introduction in the House of H. R. 1530 and in the Senate of S. 526. They met a similar fate. In the 79th Congress 2nd Session, a third effort was made to accomplish the same result by including an appropriate provision in a bill (H. R. 5089) primarily concerned with releasing enemy property to refugees. The proposed amendment would have expressly denied friendly aliens the right to recover under §9(a) possession of property vested by the Custodian. The Judiciary Committee of the Senate not only struck out this proposed amendment but its report expressly stated that by the omission there was preserved the rights under §9(a) which friendly foreign nationals had for more than 25 years under the Act. (*Senate Rep., 1839, 79th Cong. 2d Sess.*). In the discussion which attended the passing of the bill in the House it was also expressly stated that by eliminating the proposed amendment the rights of friendly aliens remained unchanged (92 *Cong. Rec. Pt.* 8, p. 10218). The history of the last of these efforts is significant.

In December 1945 H. R. 5089 was introduced by Representative Sumners, Chairman of the House Committee on the Judiciary, for consideration by the Second Session of the 79th Congress. Apparently from comments made dur-

ing the hearings, the bill was prepared in the Office of the Alien Property Custodian.

§33 of H. R. 5089 contained *inter alia* the following provisions:

> "Sec. 33. (a) A foreign country or national thereof within the meaning of section 5(b) hereof may not institute, prosecute, or further maintain a suit pursuant to section 9(a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof.
>
> "(b) Notwithstanding the provisions of section 7(c) hereof, suit may be instituted by any person not an enemy or ally of enemy against the United States in the Court of Claims for just compensation in respect of any property or interest taken from the plaintiff and vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), but the complaint in such suit shall be dismissed on the merits unless the plaintiff establishes that he is a person entitled to just compensation by virtue of the last clause of the fifth amendment to the Constitution of the United States."

Hearings were held on the bill before a sub-committee of the House Committee on the Judiciary in February and May, 1946. Prior to the hearings and under date of Febry 4th, 1946, Mr. Byrnes as Secretary of State, addressed a letter to the Chairman of the House Committee on the Judiciary in which he objected to subdivision (b) quoted above on the ground that its effect was to deny to a friendly alien the right to obtain a return of his property and to substitute only such rights for just compensation as are

granted by the Fifth Amendment, as to which he stated that the Department of Justice claims that a friendly alien does not have any rights under the Fifth Amendment to just compensation. Mr. Byrnes declared that the clause cafried a grave threat to the rights of American nationals in foreign countries, and if the position of the Department of Justice is correct, would relegate friendly aliens to a position of being without remedy for the seizure of their property except for Mr. Markham's suggestion that these rights be handled by diplomatic representations, to which suggestion the Department of State strongly objected both on principle and on grounds of enlightened self-interest. The full text of Mr. Byrnes' letter is set forth in full in the report of the hearings (*Hearings Before Sub-Committee No. I of the Committee on the Judiciary, H. R. 79th Cong. 2d Sess., on H. R. 5089,* pp. 28-29).

As a result of this objection, representatives from the offices of the Alien Property Custodian, the Attorney General and the Secretary of State seemed to have gotten together and prepared an amendment to §33 of the bill designed to overcome the objection of the Secretary of State by omitting the reference to the Fifth Amendment in subdivision (b) and substituting in place thereof a very complicated method for determining who would be entitled to sue in the Court of Claims and the conditions under which such suits should be prosecuted. Subdivision (a) was substantially retained. The bill as so amended is set forth in the report of the hearings, before the sub-committee (*supra*) at pp. 43 *seq.*

On June 26th, 1946 Representative Sumners introduced the bill in its amended form as H. R. 6890. The following day the Committee on the Judiciary favorably reported the

bill as so amended (*House Report 2398, 79th Cong. 2d Sess.*).

In the bill as so reported subdivision (a) of §33 remained substantially the same as above quoted and subdivision (b) was entirely rewritten so as to provide that notwithstanding the provisions of §7(c) a person whose property had been taken by the Alien Property Custodian could proceed in the Court of Claims for just compensation upon complying with numerous conditions in the bill set forth (*House Report*, pp. 23 *seq.*).

About the same time a bill identical with H. R. 6890 was introduced in the Senate as S. 2378. At the Senate hearings which were held in July 1946 a number of persons appeared in opposition to §33 (*Hearings Before a Sub-Committee of the Committee on the Judiciary, U. S. Senate, 79th Cong., 2d Sess. on S-2378*). It was urged that the bill repealed existing law which permitted friendly aliens to recover their seized property under the provisions of §9(a) (*Senate Hearings*, pp. 37, 40, 84); that the denial to a foreign country or national thereof of the right to proceed under §9(a) was unconstitutional as lacking due process (*Senate Hearings*, pp. 40, 58 *seq.*); that it would discriminate against friendly aliens (*Senate Hearings*, pp. 68, 89) and violate treaties of friendship (*Senate Hearings*, p. 42); that it would produce a hostile feeling among foreign nations and bring about retaliation (*Senate Hearings*, p. 62); that it would invite a repetition of policies of expropriation such as occurred in Mexico some years ago (*Senate Hearings*, p. 64); and that the enactment of such a section would cause a great deal of harm and detriment from the public relations and advertising point of view in our efforts to promote foreign trade (*Senate Hearings*, p. 87).

For the purpose of meeting these arguments, representatives of the Alien Property Custodian and the Attorney General claimed that the effect of the amendments to §5(b) by the First War Powers Act, 1941, was to modify §9(a) so as to deny to friendly aliens the rights which they previously enjoyed (*Senate Hearings,* pp. 97 and 98) and in support of this contention, the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar (*Silesian-American Corporation* v. *Markham*) was cited, and a copy of the opinion by Judge Learned Hand was placed in the record (*Senate Hearings,* p. 99). In taking this position neither the representative of the Alien Property Custodian nor the Attorney General attempted to explain, and the Committee did not attempt to ascertain, why the proposed §33 was desirable, if as they alleged, the same effect had already been achieved by the amendments to §5(b) in 1941.

In making its report on S. 2378 (H. R. 6890) the Senate Committee on the Judiciary (*Senate Report No. 1839, 79th Cong. 2d Sess.*) struck out §33 entirely. In doing this, of course, they eliminated the provisions which denied to friendly foreign countries and the nationals thereof the right to recover seized property under §9(a) of the Trading With the Enemy Act, and also the provision that notwithstanding §7(c) of that Act, just compensation could be obtained by a suit in the United States Court of Claims. In explaining this deletion the Committee said (*Report,* p. 2):

> "• • • The purpose of this amendment is to eliminate the proposals to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a). *The bill as thus amended preserves in full these rights under 9(a) which the friendly foreign national, together*

with United States citizens has had for more than 25 years under the act." (Italics supplied.)

The report of its Judiciary Committee was filed in the Senate on July 26th (92 *Cong. Rec., Pt.* 8, p. 10115), and on the same day Representative Celler submitted to the House a copy of the bill as reported in the Senate and asked for a suspension of the rules so that the revised bill could be voted upon (92 *Cong. Rec., Pt.* 8, p. 10215).

In the discussion which attended the passage of the bill the elimination of §33 was referred to and Representative Philbin inquired (92 *Cong. Rec., Pt.* 8, p. 10218):

> "If Section 33 is eliminated from this bill, then the law as then written would give to foreign friendly nationals the right to be sued and to sue in our courts and have their rights adjudicated?"

To this inquiry Representative Celler replied:

> "I may say to the gentleman that the elimination of Section 33 gives the right to a foreign national to sue for the return of his property, either in law or in equity. That does not apply to an enemy alien, only to a friendly foreign national. *That right remains unchanged if we eliminate Section 33.*" (Italics supplied.)

The rules were thereupon suspended by a two-thirds vote and the bill passed by the House.

The bill so passed by the House was brought up in the Senate on July 29th and passed with four minor amendments not included in the report of its Judiciary Committee (92 *Cong. Rec. Pt.* 8, p. 10371). These amendments made from the floor of the Senate, required that the bill again go before the House, and the additional amendments were

concurred in by the House on July 30th, 1946 (92 *Cong. Rec. Pt.* 8, p. 10486).

It will thus be seen that the opinion of Judge Learned Hand in the case at bar was submitted to the Senate Committee on the Judiciary as authority for the proposition that the effect of the amendments to §5(b) contained in the First War Powers Act, 1941, was to deprive friendly aliens of the right to recover in a proceeding under §9(a) property vested by the Alien Property Custodian and to relegate them to a suit in the United States Court of Claims to recover just compensation. With this opinion before them the Senate Committee on the Judiciary nevertheless expressly stated that by eliminating provisions designed to conform the statute with the construction placed upon §5(b) by Judge Learned Hand, it was the purpose of the Committee to preserve in full those rights under §9(a) which friendly foreign nationals, together with United States citizens, had had for more than 25 years.

In passing the bill both the House of Representatives and the Senate acquiesced in the interpretation of the statute declared by the Judiciary Committee of the Senate. Thus, the construction urged by the Custodian and placed upon §5(b) by Judge Hand was definitely rejected by the authors of the statute as contrary to their understanding of its provisions.

While it is true that the opinion expressed by the Judiciary Committee of the Senate and acquiesced in by both houses of Congress was addressed to §9(a), and the case now at bar has to do with §8(a), the wording of the two sections so far as they affect the rights of friendly aliens are identical, and if in §9(a) the meaning of the words "any person not an enemy or ally of enemy" was not changed

by the amendments to §5(b), it necessarily follows that no change was made in the meaning of the same words in §8(a), and if under §9(a) a friendly alien may still sue to recover possession of vested property, then, under §8(a) a friendly alien may retain possession of property held by such friendly aliens as pledgee.

The evidence is clear that when amending section 5(b) in 1941 the purpose of Congress was to revive and re-enact so far as necessary the Trading With the Enemy Act of 1917, which related to the seizure of enemy property, and that there was no intention of basing the statute on a Congressional power under the Constitution entirely different from that which had been employed in 1917. Furthermore, this conclusion is confirmed if the possible effects of the 1941 amendment be examined in the light of recognized canons for statutory construction.

Intent as Determined by the Rules of Construction

Where two statutes relating to the same subject have been enacted and the later can be reconciled with the former by limiting its general terms, Congress will be deemed to have intended that the general terms shall be so construed.

In *Frost* v. *Wenie* (1895) 157 U. S. 46, a statute provided that certain lands held in trust for the Osage Indians should be opened only to settlers possessing specified qualifications. Later in the same year another statute was enacted providing that lands in the Fort Dodge military reservation should be opened to settlers generally. The terms of the later statute literally embraced some of the lands covered by the earlier act. This Court held that the earlier act had not been repealed to the extent of the apparent conflict, but that the general terms of the later act were not intended to

include the lands covered by the earlier statute. In the opinion of the Court Mr. Justice Harlan said at page 58:

> "It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace *all* the lands within the abandoned Fort Dodge military reservation north of the Atchison railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute."

To the same effect see

U. S. v. *Healey* (1895), 160 U. S. 136-146;
U. S. v. *Greathouse* (1897), 166 U. S. 601-605;
U. S. v. *Lee Yen Tai* (1902), 185 U. S. 213-221;
U. S. v. *Burroughs* (1933), 289 U. S. 159-164.

The same rule is applied if, by limiting the generality of the terms employed, the constitutionality of a statute may be preserved.

U. S. v. *Walter* (1923), 263 U. S. 15-18.

In the instant case, so far as §5(b) relates to the vesting of property, it can be reconciled with §8(a) and §9(a) and

with all the other sections of the Trading With the Enemy Act by construing the words "foreign country or national thereof" as meaning "enemy or ally of enemy foreign country or national thereof". This Court is therefore obliged by its long-standing rules to conclude that such was the intention of Congress.

If section 5(b) is construed in the manner determined by Judge Hand, that is to say by eliminating from §8(a) and §9(a) the phrase "enemy or ally of enemy" and substituting in place thereof the phrase "foreign government or national thereof" the result is to deny to friendly aliens rights enjoyed by citizens of the United States, because the citizen may under §9(a) recover the property that was seized whereas the friendly alien may only recover the value thereof at the time of seizure. Judge Hand made this very clear in his opinion when he said (R. 66-67):

> "* * * A friendly alien stands in a position different from either an enemy or a citizen whose property has been seized. A citizen may avail himself of §9(a) to reclaim his property, as much when it has been seized under §5(b) as under §7(c); if he is successful in the suit, he will be restored to possession for the seizure will be shown to have been unlawful. Such too was the position of a friendly alien under §9(a) in the original Act. An enemy or an ally of enemy, is positively and intentionally denied relief, not only in §9(a) but elsewhere, because his property may be forfeited; he can rely only upon the grace of Congress. But by hypothesis a friendly alien cannot reclaim his property if the seizure has been lawful; and yet he cannot be deprived of it without just compensation, because the Fifth Amendment protects him. * * *"

Such a result is certainly a violation of existing treaties.

Article 1 of the *Convention of Friendship, Commerce and Extradition* of 1850 between the United States and Switzerland (2 Malloy *Treaties, Conventions, etc.*, p. 1764) which is still in effect (*Treaties in Force on December 31, 1941*, Publication 2103, U. S. State Department, p. 161) provides that:

> "The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitution or legal provisions, as well federal as State and cantonal, of the contracting parties. * * * they shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject."

The last paragraph of Article 2 of the same treaty reads as follows (*id.* p. 1765):

> "In case of war, or of expropriation for purposes of public utility, the citizens of one of the two contracting parties, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained."

Article 2 of the *General Multilateral Convention for the Protection of Industrial Property* (dated June 2nd, 1934 but ratified and proclaimed by the United States October 28th, 1938) (53 Stat. 1748, 1772) to which Switzerland was a party, reads as follows:

> "(1) Nationals of each of the countries of the Union shall, in all other countries of the Union, as regards the protection of industrial property, enjoy the advantages that their respective laws now grant, or may hereafter grant, to their own nationals, without any prejudice to the rights specially provided for by the present convention. Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the conditions and formalities imposed upon nationals."

It is a long standing rule that before the courts will impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the statute, which is supposed to constitute the violation, must admit of no other reasonable construction • • •."

In re *Chin A. On*, (1883) 18 F. 506;
Chew Heong v. *U. S.*, (1884) 112 U. S. 539-549;
Frost v. *Wenie*, (1895) 157 U. S. 46-59;
Cheung Sum Shee v. *Nagle*, (1925) 268 U. S. 336-345;
Pigeon River Imp. Co. v. *Cox*, (1934) 291 U. S. 138-160;
U. S. v. *Payne*, (1924) 264 U. S. 446-449.

To conclude that Congress intended to withdraw from friendly aliens property rights which American citizens

continued to enjoy would not only violate existing treaties, but would conflict with established American foreign policy, and serve as a dangerous precedent to other nations. It was this latter phase of the subject which caused Secretary of State Byrnes to express alarm to the House Committee on the Judiciary in his letter of February 4th, 1946, when that Committee had under consideration the bill designed to write into the statute an express provision denying to friendly aliens the right to recover their property under §9(a) of the 1917 statute. (*Hearings Before Sub-Committee No. I, Committee on the Judiciary, House of Representatives, 79th Cong. 2d Sess. on H. R. 5089*, p. 28.)

Another long-standing principal of statutory construction is the proposition that Congress will not be deemed to have intended to enact an unconstitutional statute.

> *Plymouth Coal Co.* v. *Pennsylvania*, (1914) 232 U. S. 531-546;
> *Presser* v. *Illinois*, (1886) 116 U. S. 252-269;
> *Grenada County* v. *Brogden*, (1884) 112 U. S. 261-269.

Congress had been warned that the Trading With the Enemy Act without §9(a) would be of doubtful constitutionality so far as it related to other than enemy property. In *Becker Co.* v. *Cummings* (1935) 296 U. S. 74 Mr. Justice Stone said at page 79:

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by §9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it."

and at page 81:

> "• • • Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court to give to citizens and *alien friends* an adequate remedy for invasions of their property rights in the exercise of the war powers of the Government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies." (Italics supplied)

In *Garvan* v. *$20,000 Bond* (C. C. A. 2d 1920) 265 F. 477, affd. 254 U. S. 554, the Circuit Court of Appeals said at page 479:

> "• • • If persons not alien enemies or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9."

The Constitutional infirmity referred to in these passages related to the problem of providing just compensation under the Fifth Amendment. In the last paragraph of §7(c), it is stated that the sole relief and remedy of any person having any claims to any money or other property heretofore or hereafter seized by the Custodian shall be that provided by the terms of the Trading With the Enemy Act. Mr. Justice Roberts in his dissenting opinion in *Becker Co.* v. *Cummings* (*supra*), said at page 84 that this provision,

> "• • • precludes a suit for the property or the proceeds of it under the Tucker Act."

This clause in §7(c) raised a barrier to both citizens and friendly aliens alike. The Tucker Act referred to by Mr. Justice Roberts is the Statute that confers jurisdiction on the Court of Claims (28 U. S. C. §250) as to "All claims founded upon the Constitution of the United States or any law of Congress * * * upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a Court of law, equity or admiralty if the United States were suable. * * *" However, "The jurisdiction of the said Court shall not extend to any claim against the government * * * growing out of or dependent on any treaty stipulation entered into with foreign nations * * *" (28 U. S. C. §259). And aliens who might otherwise sue in the Court of Claims, may only do so if they are "citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government * * *" (28 U. S. C. §261). In view of the fact that the claim of a Swiss national is in some measure at least dependent upon the treaty of 1850 (*supra*) there is serious doubt whether Swiss nationals even in the absence of the interdiction contained in §7(c) could sue to recover compensation for property seized by the Custodian under §5(b).

Moreover, if the alien's government does not provide reciprocal relief, he is definitely precluded from recovering just compensation in the Court of Claims.

With these considerations before it one can scarcely imagine that Congress would have failed to specify a means of redress if it intended that §5(b) should operate to obliterate the words "enemy or ally of enemy" from §§8(a) and

9(a) of the old Act and substitute in place thereof the words "foreign government or national thereof", especially in view of the fact pointed out by Secretary of State Byrnes in his letter to the Judiciary Committee of the House, that the Department of Justice claims a foreign national does not have any constitutional rights to just compensation, and the further fact that such an intention was contrary to traditional American policy (*Hearings Before Subcommittee I, Committee of the Judiciary House of Rep., 79th Cong., 2nd Sess., on H. R. 5089*, p. 29). As Secretary of State Byrnes said in his letter (p. 29):

> "The position of the Government of the United States has consistently been that American property and other interests abroad are entitled to fair and equal treatment as compared with locally owned property. • • • Moreover, the United States has always insisted upon the principle of adequate compensation if American property interests abroad were affected. • • •
>
> "The embarassment to this United States policy stated which is inherent in the underlined language is apparent. Should nationalization of a given type of property be accomplished in a foreign country, the Department would not—if section 33(b) as now drafted becomes law—be able to insist that the legislation implementing such nationalization provide either equal treatment for American interests or adequate compensation for interests which were taken. *The importance of this question cannot, especially at present, be minimized.* (Italics supplied)
>
> "Traditionally, the United States has encouraged foreign investment in the United States, and has regarded favorably American investment in friendly foreign countries, subject only to overriding considerations of national security. • • • The Depart-

ment of State is even now attempting to secure complete equality of treatment for American property interests in areas in which the war was fought with respect to local legislation on war damage compensation. Under these circumstances, a deliberate legislative enactment by the United States which discriminates against friendly foreign nationals and denies to them even just compensation for seizure of their property by an agency of the United States (unless compelled by the Constitution) seems a short sighted departure from principles which this Government has long advocated. The damage to American interests which might result cannot be adequately estimated.

"The position of the United States in insisting upon equal treatment and just and adequate compensation for interests of American nationals abroad has been based upon the assertion, well-founded until now, that the United States accorded such treatment to the property and interests here of friendly foreign nationals. Should this position be destroyed, by enactment of the cited provision, the ability of the United States to prevent like discrimination against American foreign interests will be seriously jeopardized if not destroyed."

These remarks of Secretary Byrnes were addressed to a proposed statutory construction of §5(b) along the lines now urged by the Custodian. The same considerations would necessarily apply to a judicial construction, and with the background which Secretary Byrnes recites, it is difficult to conceive of this Court concluding that Congress originally intended its amendment of §5(b) so to be understood.

If §5(b) is construed as having been intended by Congress to override all the rights previously secured to

friendly aliens by the Trading With the Enemy Act, there are yet other constitutional objections that arise. They relate to due process and the unlawful delegation of legislative power.

§7(c) of the 1917 statute provided that "* * * any money or other property * * * owing or belonging to * * * an enemy or ally of enemy not holding a license * * * which the President after investigation shall determine is so owing or so belongs * * *, shall be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * *" (50 U. S. C. A. p. 210).

The provision required first, an investigation, second, a finding of fact, and third, a determination that no license had been issued. It was obviously designed to prevent capricious and arbitrary action on the part of the Executive in seizing property believed to pertain to the enemy.

In *Hunter* v. *Central Union Trust Co.* (D. C., S. D. N. Y., 1926) 17 F. 2d, 174, it was held that a failure to comply with the requirement of the statute rendered an attempted seizure by the Custodian invalid. The Government seems to have acquiesced in this decision by failing to take an appeal.

§5(b) as amended contains no provision for an investigation and determination of actual or supposed enemy connection as required by §7(c) unless the two sections be construed as complementary to each other. The petitioners claim that in the case of property of friendly aliens it is not reasonable to suppose that Congress intended to withhold from the statute a necessary and salutary safeguard against capricious and arbitrary actions which the Constitution forbids. In *B. & O. R. Co.* v. *U. S.* (1936) 298 U. S. 349, Mr.

Justice Butler, in quoting from the opinion in *Reagan* v. *Farmers Loan & Trust Co.* 154 U. S. 362, said at page 366:

> "This, as has often been observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

Another evidence that Congress did not intend §5(b) as an over-riding statute is the indefinite nature of its provisions when so construed—so indefinite as to render the statute unconstitutional. Congress was cognizant of the requirements of this Court as stated by Mr. Chief Justice Hughes in *Panama Refining Co.* v. *Ryan* (1935) 293 U. S. 388 in which he said at page 415:

> "• • • Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

and at page 430:

> "• • • As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

The same principles were enunciated and applied in *Schechter Corp.* v. *U. S.* (1935) 295 U. S. 495.

In the case at bar we are concerned with the portions of §5(b) relating to the vesting of property of friendly aliens. Unless the words "foreign country or national thereof" are construed to mean "enemy or ally of enemy foreign country or national thereof", there is no suggestion as to what policy the President should pursue in causing any such vesting to take place or what distinction is to be made between enemy property which Congress has the power to confiscate and non-enemy property which cannot be taken without just compensation. Nor are there any standards set up for the purpose of ascertaining in what manner, at what time, and upon what terms any vesting may occur, or what factual finding is to be made by the President as the basis for causing the title to pass in the process of "vesting". There is no requirement that the property shall be found to be infected with an enemy interest or that the owner has been guilty of acts inimical to the United States or that the property may be put to hostile use, or that its taking shall in any way benefit the Government in the prosecution of the war.

As to dealing with property after vesting has occurred, 5(b) is limited only by the provision that it shall be *held* for the "interest and benefit of the United States". No policy is suggested as to whether the property is to be retained or liquidated, or converted into cash or utilized for war purposes or whether the sale or other disposition is to be safeguarded in any manner; no standards are set, and no factual findings are required.

The same vice exists in regard to the President's power to require the keeping of records, the furnishing of info ma-

tion, the seizure of books and papers, and the "taking of other measures not inconsistent herewith for the enforcement of this subdivision".

And according to the statute none of the foregoing is to be a limitation on the power of the President to prescribe definitions for any or all of the terms used in this subdivision. By defining the word "national" of a foreign country it is possible for the President to make it include persons and apply to circumstances not comprehended by the words "enemy or ally of enemy" in the usual definitions of legislators and lexicographers or of §2 of the 1917 Act and in making such definition there is no indication as to the policy by which the President should be governed, no standard with which he should conform and no findings of fact necessary as conditions precedent to the exercise of his extraordinary power.

If anyone fails to comply with the exercise of any of these powers uncontrolled by any statement of policy, unlimited by any standards, and needing no factual determinations, the person's failure is made a crime in the category of a felony with very serious penalty.

As to that part of §5(b) which has to do with the vesting of property owned by aliens, there has been no subsequent Congressional ratification, such as occurred in relation to freezing controls (cf. *U. S.* v. *Von Clemm* (C. C. A. 2d 1943) 136 F. 2d 968), although bills have been introduced in Congress designed to effect such a result (H. R. 4840 as amended after hearings in H. R. 5031 78 Cong. 2d Sess; H. R. 1530, S. 526, 79th Cong. 1st Sess.). But these bills never got out of the Judiciary Committee.

In the Court below Judge Hand recognized the indefinite nature of §5(b) when construed in the manner which

he adopted and attempted to justify it by becoming more indefinite than the statute itself. He said (R. 65):

> "* * * it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through 'rules and regulations'. The only objection to this which can be raised is that it disturbs the constitutional 'separation of powers'; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed, of statement in any other terms than that the interest of the country demands the prescribed action."

In this statement Judge Hand was in error. §5(b) does not require the President to act by any rules or regulations. The issuance of rules and regulations is not a condition precedent to any action by the President; the statute merely states, "under such rules and regulations as he *may* prescribe". Even so, this is nothing more or less than delegating to the President a power to determine basic policy which may be exercised solely by Congress itself.

Judge Hand also errs in concluding that the statute provides for exercise of the power in such manner as the interest of the country demands. There is no such limitation in the statute. The nearest approach to such a limitation is a provision that after property has been vested, it shall be held and dealt with "in the interest of and for the benefit of the United States".

The basic question involved is whether Congress may,

if so disposed, make such a broad and unrestricted delegation of its legislative power as is represented by §5(b) when construed in the manner adopted by Judge Hand, who seems to confuse the principle of delegation with the constitutional axiom regarding the separation of powers. They are not the same and no good can come from attempting to justify one in the terms of the other.

If the theory for the delegation of legislative power pronounced by Judge Hand is approved by this Court, it will mean that Congress is no longer limited in the degree to which it may abdicate its functions to the Executive. Such a result is so contrary to the previous decisions of this Court and to the temper of Congress that it becomes the strongest argument against the construction which Judge Hand undertakes to place on the statute.

In view of these considerations the conclusion seems inescapable that in amending §5(b) by the First War Powers Act, 1941, Congress clearly intended that §5(b) should not be construed in derogation of the other permanent provisions of the Trading With the Enemy Act.

POINT III

If the amendment of §5(b) by the First War Powers Act, 1941, has not repealed or modified §9(a), it necessarily follows that §8(a) has not been repealed or modified.

In *Uebersee Finanz-Korporation* v. *Markham* (1946), 158 F. 2d 313, the Court of Appeals for the District of Columbia has held that the amendment to §5(b) by the First War Powers Act, 1941, does not operate to nullify

the provisions of §9(a) and that the relative provisions are not inconsistent. Mr. Chief Justice Groner states in his opinion (p. 315):

> "The Custodian attempts to avoid the stark obliteration from §9(a) of the words 'Any person not an enemy or ally of enemy', by saying that that section limits recovery to 'the interest therein' of the claimant, and accordingly the Custodian insists there may be no recovery here because seizure under amended §5(b) destroys all interests of all aliens in seized property. But there is nothing in §5(b) to sustain this view and to adopt it would read into that section words that are not there and at the same time, and with just as little warrant, read out the quoted words from §9(a). This assumes, we think, too much."

§§8(a) and 9(a) are different sides of the same coin. §8(a) exempted from seizure enemy property held by non-enemy pledgees with power of sale by providing that the pledgees could retain possession of such property and exercise their usual rights in relation thereto. As was shown under Point I (*supra*, p. 10), §8(a) was deliberately designed as an exception to the power of seizure accorded to the Custodian. §9(a) on the other hand, provides that a non-enemy owner of property may recover possession of the property mistakenly seized. §8(a) relates to the retention of possession and §9(a) has to do with the recovery of possession. The wording of the two sections so far as it relates to non-enemies is parallel. §8(a) provides that (*infra* p. 72), "any person not an enemy or ally of enemy" who is a pledgee of enemy property with power of sale "may continue to hold said property". §9(a) provides that (*infra* p. 74), "any person not an enemy or ally of enemy"

claiming an interest in property that has been seized may institute a suit to establish his right, title or interest in said property, "and if so established the court shall order the * * * delivery to said claimant of the * * * property so held * * * to which the court shall determine said claimant is entitled." If §9(a) still stands, §8(a) must also be persistent.

As pointed out by Mr. Chief Justice Groner, to adopt the view of the Custodian would be to eliminate from §9(a) the words "any person not an enemy or ally of enemy" and to substitute in place thereof "any person not a foreign country or national thereof". The Custodian's position regarding §8(a) would produce a similar result in that section. There is no justification for either of these proposals.

Regarding §9(a), the Custodian has recognized the weakness of stating his argument in terms of its effect on the statute, and endeavors to avoid this embarassment by round about reasoning. As suggested by Mr. Chief Justice Groner in the above quotation and also by Judge Hand (R. 67), the Custodian concedes that any person not an enemy or ally of enemy may sue to recover property which such person claims, but the Custodian nevertheless urges that the suit would be futile, because through the operation of §5(b) the claimant has lost his interest in the property and ceased to be "entitled" to any part thereof. While this artificial argument may be made with respect to §9(a), it is entirely inapplicable to §8(a), because the former has to do with the recovery of possession, whereas the latter provides for the retention of possession. If, after the amendment to §5(b) a non-enemy under §9(a) still had the power to sue for possession, though ineffectually, it would logically follow that under §8(a) a non-enemy still had the power to re-

tain possession, and the spurious nature of the Custodian's argument is thus exposed.

Consequently, if the decision of the Court of Appeals in the *Uebersee* case is affirmed, as a corollary thereto the decision of the Circuit Court and of the District Court in the case at bar must be reversed.

POINT IV

The exculpatory provisions of §5(b)(2) and §7(e) do not protect the debtor and relieve it from doubt as to possible liability.

In the instant case §8(a) provides that a friendly alien who holds property as a pledgee with power of sale may retain possession of such property, and the Custodan does not have the right to take it into his possession. The history of §8(a) in Congress definitely shows that it was to be a limitation on the power of seizure conferred upon the Custodian by §7(c). If this be true, any demand to seize or order to vest issued by the Custodian is invalid. The Custodian however, claims that the Debtor has no right to be concerned with the validity of any such demand or order, and should be compelled to comply with it because §5(b)(2) and §7(e) exculpate the Debtor from liability. It would seem that the mere statement of this contention should demonstrate its vicious nature. Because, if a public official can thus coerce an interested party into compliance with his unlawful actions, thereby also impairing the rights of others, a long stride has been taken toward making this a government of men and not of laws.

Judge Hand in his opinion evinced an inclination to concede that such an exculpatory clause would be invalid with respect to an unconstitutional statute. He states (R. 67):

> "* * * Thus, it can be argued with much force that, unless some provision can be found by which he (a friendly alien) may secure compensation, §5(b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection 2 would be valid * * *".

Hence, the Circuit Court indicated that an act by a public servant unlawful because the controlling statute was unconstitutional, would not be protected, whereas an act by the same public servant in violation of a constitutional statute would nevertheless acquire the aspect of legality by being enforceable despite its infirmity.

Both §5(b)(2) and §7(e) provide exculpation for acts done "pursuant to * * * any rule, regulation, instruction or direction issued hereunder * * *", or "in pursuance of any order, rule or regulation made by the President under the authority of this act." If the Custodian's order is a violation of the statute, it cannot be said to have been issued in pursuance of the statute. This consideration in itself should be sufficient to justify the conclusion that compliance with the Custodian's order cannot protect the Debtor and relieve it from doubt, at least until the order is definitely determined to be lawful.

In addition to this consideration, however, it is believed that the very nature of these exculpatory statutes is such as to render them unconstitutional.

The exculpatory clauses of both §5(b)(2) and §7(e) are substantially the same and have two different aspects. One purports to concern obligations of persons affected by

acts done in pursuance of the statute, and the other purports to impose restrictions on what a court may do in relation to conduct connected with the administration of the statute.

As to the subject of obligations, §5(b)(2) provides that "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. * * *". §7(e) in treating the same subject, provides, "Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." The central idea in each clause is represented by the word "obligation". This word is not qualified. Ordinarily the word "obligation" when used in connection with payment, etc. means the obligation of the person making the payment to the person receiving the same; that is to say, in the instant case the obligation that would be discharged would be the obligation of Silesian-American Corporation to the United States or to the Alien Property Custodian. Such however does not appear to be the construction placed upon the word by the District Court, which apparently understood the word "obligation" as meaning the obligation of Silesian-American Corporation to all persons whomsoever, including Non-Ferrum and also the Swiss banks (R. 49). The Circuit Court disposed of this difficulty by saying (R. 66):

> "(We pass without discussion the patently untenable argument that this covers only 'obligations' and liabilities to the United States.)"

The petitioners claim that if the word "obligation" is construed to mean obligations to all persons whomsoever, to that extent the statute is unconstitutional.

Turning now to the second aspect of the exculpatory clause, we find that §5(b)(2) provides,

> "• • • no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

§7(e) provides, "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

The second aspect of the clause goes much farther than the first aspect mentioned above. It attempts in effect to close every court in the land to claims that might otherwise be asserted on account of unlawful conduct either by government agencies or by others acting in response to the demand of such agencies. It says in substance that if any suit is based upon conduct connected with the statute, regardless of what the actual facts may have been, the simple fact that the defendant acted in good faith in pursuance of the statute shall preclude consideration by the court of all other facts, whether they involve constitutionality of the statute, the stupidity or mistake of government employees, a deliberate violation of the statute by such

employees, or a special obligation of the defendant in the absence of the statute. This second aspect therefore goes beyond a conclusive presumption. It represents a direct and unqualified attempt to interfere with the normal function of a court.

Although this Court in *Great Northern Ry. Co.* v. *Sutherland* (1927), 273 U. S. 182-194, evidently without hearing argument on the subject, but after having established the validity of the demand by the Custodian, said that §7(e) afforded the railway company protection, the petitioners contend that, especially in the light of subsequent decisions, these clauses whether contained in §5(b)(2) or §7(e) are invalid so far as the instant case is concerned because (1) they attempt to set up in effect a conclusive presumption as to controversies arising between Silesian-American Corporation and the Swiss banks; (2) they represent an attempted invasion by Congress of the judicial process; and (3) if §5(b) as amended is unconstitutional as to friendly aliens, the exculpatory clause in neither §5(b)(2) nor §7(e) can serve to circumvent the result of such unconstitutionality. For purposes of clarity each of these arguments will be treated under separate headings.

Congress May Not Enact Conclusive Presumptions

This Court has frequently held that a statute which attempts to set up a conclusive presumption is unconstitutional, and that legislative fiat may not take the place of facts in a judicial determination of issues involving life, liberty or property.

Western & Atlantic R. Co. v. *Henderson* (1929); 279 U. S. 639-642;

St. Louis & O'Fallon R. Co. v. *U. S.* (1929), 279 U. S. 461-492;

Schlesinger v. *Wisconsin* (1926), 270 U. S. 230;
Heiner v. *Donnan* (1932), 285 U. S. 312-325-328;

See also the *dicta* in

Bandini Petroleum Co. v. *Superior Court* (1931), 284 U. S. 8-19;
U. S. v. *Carolene Products Co.* (1938), 304 U. S. 144-152;
Tot v. *U. S.* (1943), 319 U. S. 463-467.

The Invasion of the Judicial Process

The functions of our government are apportioned, and to the Judiciary has been assigned the duty of interpreting and applying the law. The general rule is that none of the three departments may invade the province of the other or control, direct or restrain the actions of the other. *Massachusetts* v. *Mellon* (1923), 262 U. S. 447-488.

Congress can exercise no function which is judicial unless it be by the Constitution conferred upon it. *Kilbourn* v. *Thompson* (1880), 103 U. S. 168.

Congress may not determine the amount of an award for property taken for a public purpose. *B. & O. R. Co.* v. *U. S.* (1936), 298 U. S. 349.

As to claims to "abandoned" property during the Civil War, Congress could not provide that the acceptance of a pardon deprived the Court of jurisdiction. *U. S.* v. *Klein* (1871), 80 U. S. 128-145-147.

The Legislature may not forbid the courts to direct a verdict. *Thoe* v. *Chicago M. & St. P. Ry. Co.* (1923), 181 Wis. 456, 195 N. W. 407.

The Legislature in appropriating funds for paying the salary of an Executive office which it has created, may not determine who such officer may be by providing that the

payment shall be made only to a specific individual. *State ex rel. Worrell* v. *Carr* (1891), 129 Ind. 44, 28 N. E. 88.

The large number of cases that arose under the Trading With the Enemy Act of 1917 following World War I is mute testimony of the fact that the legal profession in the United States did not regard the exculpatory clause in the statute as providing a certain shield against liabilities for dealings had with the Alien Property Custodian.

As an Attempt to Avoid by Indirection the Result of Unconstitutionality

If the vesting clause in §5(b)(2) is unconstitutional and the exculpatory clause is nevertheless given effect, Congress will thus be enabled in a measure to achieve by indirection that which could not be accomplished by direct enactment.

In *St. Joseph Stock Yards Co.* v. *U. S.* (1936), 298 U. S. 38, Mr. Justice Hughes in delivering the opinion of the Court said at page 52:

> "* * * Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

In *Peo. ex rel. Burby* v. *Howland* (1898), 155 N. Y. 270, it was said at page 280:

> "When the main purpose of the statute, or a part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise, the Constitution would furnish frail protection to the

citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands."

To the same effect see

Heiner v. *Donnan* (1932), 285 U. S. 312-329;
Bailey v. *Alabama* (1911), 219 U. S. 219-239;
Fairbanks v. *U. S.* (1901), 181 U. S. 283-294.

POINT V

The District Court erred in failing to give the Swiss banks an opportunity to prove their rights as pledgees with power of sale.

The Debtor corporation is in the custody of the District Court. Its officers, directors, agents, etc., are enjoined from interfering with the possession or management of the property of the Corporation (R. 38). Certificates representing its shares are the property of the corporation and when issued create an obligation or right against the corporation (11 Fletcher Cyc. Corps. §5174). It is therefore not competent for the officers of the corporation to issue new certificates without an order of the Court. In making such an order it is necessary for the Court to determine whether in violation of the corporate by-laws (R. 30-31) and the Uniform Stock Transfer Act (§13; N. Y. Pers. Prop. L., §174) the officers of the corporation should be directed to issue to the Alien Property Custodian new certificates representing shares which the trustee as agent of the Court has reported are held by the Swiss banks as pledgees (R. 41).

In a proceeding under the Chandler Act it is basically necessary for the Court to determine who are the stockholders of the corporation. §196 (52 Stat. 893; 11 U. S. C. §596) provides that:

> "After the approval of the petition the judge shall prescribe the manner in which * * * the interests of the stockholders may be * * * allowed."

It was therefore reversible error for the District Court to conclude that the interest of the Swiss banks "cannot be considered here" (R. 49). The Court was under the duty of determining whether Vesting Order 370 was valid or invalid. If 370 was invalid, obviously new certificates should not be issued to the Custodian.

At the hearing before the District Court the Swiss appeared by their attorney and pleaded for time in which to obtain documentary evidence showing their interest in the described shares (R. 17 *seq.*), and after the hearing but before the decision of the Court, documents supplied by the Swiss banks and intended to show their interest were submitted to the Court with the suggestion that they were not the documents which the attorney for the Swiss banks wished to procure (R. 43).

The Court will take judicial notice of the fact that the Swiss banks were in a difficult position in the matter of producing evidence for the purpose of proving their title.

The original order appointing trustees did not provide for the transfer of stock and the issuance of new certificates by the Debtor corporation, and no prejudice could have resulted to the Alien Property Custodian by a refusal to modify this order or to issue new certificates.

It is a well established doctrine that matters pending before a court will be continued where the parties are prevented by war from securing and presenting their proof in an orderly manner.

Watts v. *Unione Austriaca etc.* (1918), 248 U. S. 9-22;
The Kaiser Wilhelm II (C. C. A. 3rd 1917) 246 F. 786-789;
Spreckles Co. v. *The Takaoka Maru* (S. D. N. Y. 1942), 44 F. Supp. 939.

POINT VI

The order of the District Court should be reversed and the District Court should be directed that new certificates for the shares described in vesting order 370 may not be issued to the Alien Property Custodian, or in the alternative the case should be remanded to the District Court to take further proof to determine whether the Swiss banks are friendly aliens and the said shares are held by the Swiss banks as pledgees within the exemption provisions of §8(a).

Respectfully submitted,

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APPENDIX

THE TRADING WITH THE ENEMY ACT

SECTION 5(b)

as amended by

§301, Title III, First War Powers Act, 1941
C. 593, 55 STAT. 839

(Portion remaining from previous amendment (54 Stat. 179) shown in regular type; deleted matter shown in bracketed black face type, and new matter shown in italics.)

5(b) (*1*) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, *and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise*——

(A) investigate, regulate, or prohibit, **[under such rules and regulations as he may prescribe, by means of licenses or otherwise]** any transactions in foreign exchange, transfers of credit **[between or payments by or to banking institutions as defined by the President,]** *or payments between, by, through, or to any banking institution,* and *the importing,* exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, **[or]** currency *or securities,* and **[any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness, or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest,**

by any person within the United States or any place subject to the jurisdiction thereof;]

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President **[may]** *shall, in the manner hereinabove provided,* require any person to *keep a full record of, and to* furnish under oath, *in the form of reports or otherwise,* complete information relative to any *act or* transaction referred to in this subdivision *either before, during, or after the completion thereof, or relative to any interest in foreign property,* or *relative* to any property in which any **[such]** *foreign* **[state]** *country* or *any* national **[or political subdivision]** *thereof* has *or has had* any interest, *or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be re-*

quired, the President may, in the manner hereinabove provided, require **[including]** the production, *or if necessary to the national security or defense, the seizure,* of any books of account, *records,* contracts, letters, *memoranda,* or other papers, **[in connection therewith]** in the custody or control of such person, **[either before or after such transaction is completed.]**; *and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.*

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: PROVIDED, HOWEVER,

That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or; if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Section 7(c) as amended November 4, 1918 (40 Stat. 1020):

7(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

Section 7(e) as enacted October 6, 1917 (40 Stat. 418):

7(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any

order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. . . .

. . . . . .

Section 8(a) as enacted October 6, 1917 (40 Stat. 418):

8(a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: PROVIDED, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said

instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: PROVIDED FURTHER, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

Section 9(a) as amended June 5, 1920 (41 Stat. 977):

9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall de-

termine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.